



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF CAMPAIGN & POLITICAL FINANCE

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MICHAEL J. SULLIVAN
DIRECTOR

December 15, 1995
AO-95-42

John J. Ferriter
Begley & Ferriter, P.C.
One Court Plaza
P.O. Box 711
Holyoke, MA 01041

Re: Holyoke Gas & Electric Department

Dear Mr. Ferriter:

This letter is in response to your October 24, 1995 request for an advisory opinion relating to expenditures by the Holyoke Gas & Electric Department ("the Department") in connection with the Department's application for a license to operate a hydroelectric project.

Question:

(1) May the Department expend funds to inform the public regarding the many issues¹ involved with filing an application for the license?

(2) May the Department expend funds to influence a non-binding city-wide ballot question asking whether the Department should file the application?

Answers:

(1) No.

(2) No.

Facts:

You have stated that the Department, a Massachusetts light plant organized pursuant to M.G.L. c. 164, has studied the risks and benefits of filing a competing application with the Federal Energy Regulatory Commission (FERC) for the license to operate a hydroelectric project on the Connecticut River in Holyoke, Massachusetts. The three member Commission that provides direction to the Department manager under M.G.L. c. 164, s. 56 recently voted to begin the process of filing a

¹ Given the facts stated in your letter, I assume that these issues relate to the non-binding ballot question which is the subject of your second question. If the issues do not relate to the ballot question, expenditures would not be within the jurisdiction of this office.

competing application against the current license holder, Holyoke Water Power Company, a wholly owned subsidiary of Northeast Utilities (NU).

You have also stated that the Department "is operated as a private business competing head-to-head for industrial electric customers and there are no tax dollars or general public funds being expended for these purposes."

Reports completed by two consultants to the Department are several hundred pages long. You would like to inform the public about the issues addressed in the reports.

A non-binding ballot question on the November 7 ballot in Holyoke asked voters whether the Department should file the competing application. The voters approved the application by a vote of 7,981 to 2,244. Although the Department did not make expenditures to influence the ballot question, you would like to know if such expenditures could properly be made in the future, in connection with similar referenda.

Discussion:

I. The Anderson decision.

In Anderson v. City of Boston, 376 Mass. 178 (1978), the Supreme Judicial Court concluded that the City of Boston could not appropriate funds, or use funds previously appropriated for other purposes, to influence a ballot question submitted to the voters at a State election. In addition, the campaign finance law provides that no person, combination of persons or corporation may "in connection with any nomination or election receive money or its equivalent, expend, or disburse . . . the same, except as authorized by [chapter 55.] (Emphasis added)" See also M.G.L. c. 55, s. 22A which requires cities, towns and other governmental units to file campaign finance reports of expenditures in connection with a ballot question. The campaign finance law also prohibits the solicitation or receipt of political contributions by public employees, the solicitation or receipt of such contributions in buildings occupied for municipal purposes, and the delivery of political funds from one person in the service of a city to another such person. See M.G.L. c. 55, sections 13, 14 and 15.²

Accordingly, this office has concluded that "governmental entities" may not expend public resources or contribute anything of value in support of or opposition to a ballot question. In addition, public resources may not be used to distribute even admittedly objective information regarding a ballot question unless expressly authorized by state law. See the Joint Memorandum issued by the Secretary of State's Election Division and this office on January 14, 1994 (a copy is enclosed).

² You have not asked if employees of the Department are subject to sections 13, 14 and 15. It would appear, however, that they are. See Commonwealth v. Oliver, 342 Mass. 82 (1961) (manager of municipal lighting plant is considered an officer of city who would be subject to embezzlement statute, c. 266, s. 51).

II. Application of the Anderson decision to the Department:
The Department is subject to the prohibitions stated in
the Anderson decision, even if it is, in some respects,
like a private business.

In many respects, the Department is a public entity which is part of the City of Holyoke. In addition to being a "department" of the City, sections 34 through 69S of M.G.L. c. 164, which provide municipalities with the authority to acquire and maintain electric plants, reflect a close relationship between such enterprises and the municipality. In particular, section 40 of the statute states that a city or town may incur debt as provided in M.G.L. c. 44, for the purpose of acquiring or maintaining a power plant. Sections 56 and 57 provide that the mayor of a city, or selectmen or municipal light board of a town acquiring a power plant, shall appoint a manager who shall be under the direction and control of the mayor, that the manager's compensation and term of office is fixed by the city council, selectmen or municipal light board, that the auditor or selectmen of the city or town may inspect the accounts kept by the power plant and that the power plant must furnish the mayor, selectmen or municipal light board with annual financial reports. Section 57A states that a city or town may appropriate funds for the maintenance or operation of a plant.

In some respects, however, the Department is comparable to a business, separate and distinct from the city. You have noted that the Supreme Judicial Court has defined municipal power plants organized under c. 164, s. 34, et. seq., as "public service corporations." "Like a private corporation, [a municipal power plant] . . . is an independent entity created pursuant to a statute. . . . It is separate from the [city] and exists to operate property 'in its right of private ownership,' to the end of providing electricity to retail consumers." Planning Board of Braintree v. Department of Public Utilities, 420 Mass. 22, 647 N.E. 2d 1186, 1190 (1995).

In the Braintree case, however, the Court determined that a municipal electric department was a "public service corporation" in the context of M.G.L. c. 40A, s. 3, which allows the Department of Public Utilities (DPU) to grant to public service corporations exemptions to zoning by-laws. The determination by the Court that municipal electric departments are "public service corporations" for purposes of c. 40A does not mean that municipal electric departments are exempted from Anderson and the provisions of the campaign finance law.

In Anderson, the Court emphasized that "fairness and the appearance of fairness are assured by a prohibition against using public tax revenues to advocate a position which certain taxpayers oppose." 376 Mass. at 195. The Court stated that "[t]he Commonwealth has an interest in assuring that a dissenting minority of taxpayers is not compelled to finance the expression on an election issue of views with which they disagree. Unlike the shareholders of a private corporation..., real estate taxpayers . . . cannot avoid the financial consequences of the city's appropriation of funds." 376 Mass. at 196.

Like the taxpayers in Anderson, residential customers do not have a choice regarding what company or city department will provide electricity. The charges paid by customers, like taxes, are compulsory if basic services provided to residents of the City, are to be received.³ Moreover, I believe that the perception of the public is that the Department exists within the framework of Holyoke's municipal government. Therefore, notwithstanding the Department's receipt of fees from rate payers rather than tax revenues, the expenditure of such funds to influence an election would be inconsistent with Anderson.

Next, you have argued that the manager of the Department has substantially more discretion than the department head of other city departments. In support of the contention that the Department should be treated differently than other departments, you have referred this office to Municipal Light Commission of Peabody v. City of Peabody, 348 Mass. 266, 203 N.E. 2d 104 (1964), in which the Supreme Judicial Court cited M.G.L. c. 164, s. 56 for the proposition that the manager of a municipal light plant has full charge of the operation and management of the plant. The Court stated that "within the limits of the business operation as defined by the statute, the mayor and city council have no restrictive powers" over the expenditures of the Department. 203 N.E. 2d at 106.

Notwithstanding the Department's independence from municipal control suggested in Peabody, the conclusion reached in that opinion is not persuasive in the context of the prohibition on political expenditures.

Finally, you have suggested that unlike the City of Boston in Anderson, the Department is engaged in a business and must compete with a corporation similarly receiving revenues in the form of fees for electricity. Since both the Department and NU compete for industrial electric customers, and since NU may make expenditures to influence a ballot question, you contend that it would be reasonable for the Department to similarly compete for public support.

³ Anderson would appear to prohibit the Department's expenditure of revenue received from rate payers regardless of whether such revenue is considered to be derived from "taxes" or "fees." But see Baker v. Department of Environmental Protection, 39 Mass. App. Ct. 444 (1995), the most recent case discussing the distinction between taxes and fees. In Baker, the Court determined that a charge (a filing fee required in connection with the filing of a notice of intent to alter wetlands) was a fee rather than a tax since the charge was not compulsory, was levied in exchange for a particular governmental service benefiting the party paying the fee in a manner not shared by other members of the public, and was used to offset the cost of government rather than raise revenue. campaign finance law. The degree of power which might be exercised by any particular department head has no bearing on the appearance of impropriety which is to be avoided by the prohibition on political expenditures.

It is not the role of this agency to determine whether a "level playing field" should exist in relation to ballot question campaigns.⁴ If the City of Boston has an interest in a ballot question which is opposed to the interest of a business corporation, the business corporation may make expenditures, but the City may not. Similarly, the Department may not make expenditures, although its officers, employees or rate payers may establish a ballot question committee to raise funds⁵ - but not from revenues derived by the Department from rate payers.

III. Conclusion.

For all the above reasons, it is our opinion that the Department may not, consistent with the campaign finance law, expend funds to inform the public about an issue in order to influence the vote on a ballot question.

This opinion has been rendered solely on the basis of representations made in your letter and conversations with staff from this office, and solely in the context of M.G.L. c. 55, the campaign finance law. Please do not hesitate to contact to call if you have additional questions about this or any other campaign finance matter.

Sincerely,



Michael J. Sullivan
Director

MJS/GB

Enclosure

cc: Thomas E. Bessette, Esq., Department of Public Utilities
Robin Hall, Esq., Elections Division

⁴ In 1981 the Legislature added section 33A to c. 164. Section 33A states that "[n]o gas or electric company regulated by the department under this chapter may recover from any rate payer of such company any direct or indirect expenditure by such company for promotional or political advertising" Although DPU has indicated that s. 33A applies to investor owned "gas or electric companies," not municipal light plants, the Legislature would not have considered it necessary to include municipal light plants within the scope of the prohibition in light of the Anderson decision.

⁵ It would appear, however, that officers or employees of the Department may not actually solicit or receive political contributions. See M.G.L. c. 55, s. 13.